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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

AMERICAN COLLEGE OF PHYSICIANS,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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PRELIMINARY STATEMENT

The Amercian Society of Association Executives ("ASAE") submits this brief *amicus curiae* in opposition to the government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit. All parties to this suit have given ASAE written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The American Society of Association Executives (ASAE) is a non-profit organization exempt from taxation under Section 501(c)(6) of the Internal Revenue Code. ASAE exists to promote the art and science of association management and to educate its

members and the general public in the advancement, improvement and uses of voluntary associations. The membership of ASAE is comprised primarily of full-time staff personnel engaged in the management of trade, professional, technical, educational, philanthropic or similar type organizations. ASAE has over thirteen thousand active members. ASAE has long been recognized as a leading speaker and advocate on association issues, particularly where, as in the present case, the ability of associations to function as educational and public spirited organizations is at stake.

A number of ASAE's 13,000 members are actively involved in managing associations that publish educational journals and many of these journals accept educational advertisements such as those which the Federal Circuit considered in *American College of Physicians*, below. ASAE also publishes several magazines that accept educational advertisements. ASAE's monthly publication *Association Management*, is read by thousands of association executives and contains numerous articles and advertisements on good management techniques, effective tradeshow strategies, membership needs, changes within various professions, disciplines and industry groups as well as relevant news on legal events concerning charitable and educational non-profit organizations.

Many association executives have been forced to forego the opportunity to assist their members in providing the most expansive and broad reaching educational information because of the restrictive interpretation of the non-profit advertising regulations used by the Internal Revenue Service. This interpretation has often been a factor in the decisions of many associations not to publish advertisements in their magazines and journals, even where it is clear that such advertisements would assist members in making intelligent choices and being more aware of issues and decisions with which they must deal in their work. ASAE believes that the decision of the Federal Circuit is one of a factual determination based on a clear statutory and regulatory meaning and that any further review would entail a review of a simple factual dispute and not, as is required under the rules of the United States

Supreme Court and applicable case law, a review of a question of law. A grant of certiorari in this case is unwarranted and would send a message to the government that whenever there exists a factual dispute as to the activities of an association, the way to resolve the problem is through a petition for a writ of certiorari to the United States Supreme Court. This would set a bad precedent.

ASAE believes that its experience as a non-profit organization leader and its insight into the issues on certiorari will prove helpful in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present case involves no conflict among the several circuits; it involves no departure by a court from the accepted and usual course of judicial proceedings, nor does it contain an important question worthy of review by the Supreme Court of the United States. The decision below does no more than correct an erroneous factual analysis rendered by the United States Claims Court, and this cannot be the basis upon which a writ of certiorari to the Court of Appeals for the Federal Circuit will issue. To grant a petition for a writ of certiorari in this case would be to encourage resort by the federal government to the United States Supreme Court whenever a lower court renders a factual based decision with which a government agency is displeased.

The assertions of the United States with regard to certiorari do not meet the requirements of rule 17 of the United States Supreme Court. If the petition is granted in this case, the government will only argue that the facts of this case were wrongly interpreted by the Court of Appeals for the Federal Circuit. There is no need for this Court to review such a case.

I. NO "SPECIAL AND IMPORTANT REASONS" JUSTIFY THE GRANTING OF CERTIORARI

Recognizing that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor . . . ," U.S.

Sup. Ct. Rule 17.1, the government seeks to persuade this Court that such reasons exist because the decision below has nationwide impact and because it conflicts with congressional intent. While it is true that the decision of the Federal Circuit Court of Appeals may have nationwide impact, such an impact accords with the purposes underlying the creation of that court and, in no way, demands review in this Court. Nor does the decision below conflict with congressional intent; indeed, the decision represents a faithful adherence to the considerations which gave rise to the enactment of Section 513(c).

1. As the government admits, the "decision below is the first by a court of appeals to consider the question presented here." (Petition for Certiorari at 25). Thus, it is clear that the question sought to be presented is not one which has given rise to conflicting decisions of the courts of appeal, nor does it involve issues which are of recurring importance in the administration of the tax laws. Under this Court's rules and decisions governing the granting of certiorari in tax cases, the existence of a conflict in the decisions of the courts of appeal or the presence of an issue which is of recurring importance in the administration of the tax laws, generally, is required before this Court will grant review on certiorari. *Bingler* v. *Johnson,* 394 U.S. 741 (1969); *United States* v. *Zacks,* 375 U.S. 59 (1963). This Court's own rule, governing review on certiorari, was amended in 1984 to provide that review of decisions of the United States Court of Appeals for the Federal Circuit would be controlled by the same considerations applicable to review of decisions of all other courts. U.S. Sup. Ct. Rule 17.2.

Nevertheless, the government attempts to argue that the very absence of a conflict in decisions requires the granting of certiorari. The government asserts, quite accurately, that the United States Claims Court is a court of nationwide jurisdiction and that any taxpayer can have its case heard there, with review in the Federal Circuit. The government goes on to state that, unless certiorari is granted, "the decision below will in all likelihood prescribe the governing legal standard on the subject [of taxation of advertising which appears in journals published by tax exempt organizations]." (Petition for Certiorari at 26).

In essence, the government is saying to this Court that certiorari must be granted because the government does not like the outcome below and that decision may become controlling law. A party's displeasure with a judicial decision cannot provide a legitimate basis for the granting of certiorari. Moreover, were this Court to concur with the government's argument, it would, effectively, eviscerate the power and authority of the Federal Circuit Court of Appeals. In every future instance in which the Federal Circuit decided an issue of first impression, if the government were displeased with the outcome, it could seek review in this Court solely on the basis that the Federal Circuit's decision had nationwide impact and application.

In creating the United States Court of Appeals for the Federal Circuit, Congress was mindful of two primary considerations. First, there was a perceived need "for the definitive adjudication of selected categories of cases" and for the creation of a "forum for appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity." S. Rep. 97-275, 97th Cong., 2d Sess. 3-4 (1981), reported in 2 *U.S. Code Cong. & Ad. News* (1982) 13-14. Secondly, Congress recognized that this Court was "operating at — or close to — full capacity; therefore, in the future the Court cannot be expected to provide much more guidance in legal issues than it now does." *Id.* at 3. It was the express intent of Congress to create a court which could render decisions of nationwide application in certain areas of the law, which decisions would *not* have to be reviewed by this Court in order to achieve national uniformity. The government attempts to turn the intent of Congress on its head by asking this Court to create an automatic right of appeal to this Court from adverse decisions in the Court of Appeals for the Federal Circuit.

In the absence of a conflict between a decision of the Federal Circuit and the decisions of other courts of appeal, there can be no compelling reason for this Court to review the decision of the Federal Circuit.

2. This case does not present an issue of recurring importance in the administration of the tax laws. The court of appeals

did not overrule or give an unusual construction to any statute. The court merely reviewed the trial court's decision and reversed it on a finding that the trial court's analysis of the facts of the case was clearly erroneous. In so doing, the court merely held that the respondent's journal's advertising was "substantially related" to the respondent's exempt educational function. This is the test set out in the statute. Since the court of appeals did not in any way overrule or modify this statutory test, its decision can occasion no "issue which is of recurring importance in the administration of the tax laws."

II. THE GOVERNMENT IS MERELY ASKING THIS COURT TO REVIEW THE APPEALS COURT'S FACTUAL DETERMINATION

The government states that the court of appeals has decided "an important question of federal tax law" in a way that conflicts with congressional intent (Petition at 8). This is not the case. The court of appeals stated the statutory and regulatory standards and reviewed the finding of the lower court that the advertising in the College's journal did not meet the "substantially related" test. The court of appeals " . . . conclude[d] that the trial court's finding that the advertising in *Annals* is not substantially related to the College's tax-exempt, educational purpose, was clearly erroneous." (Petition App. A at 19a). The court of appeals correctly stated the rule of law embodied in sec. 513(c) and the regulations thereunder. The court of appeals, in applying that rule of law to the facts before it on review, simply decided that the trial judge's analysis of the facts was clearly erroneous.

The court of appeals' decision turned on the facts presented in that particular case. The fact that the court of appeals found that the advertising contained in the College's journal met the "substantially related" test of Section 513 in no way implies or necessitates that henceforth all other courts must find that advertising in any other journal published by a tax-exempt entity meets the statutory test, unless this Court intervenes. Since the court of appeals' decision rests on its review of the facts peculiar to the case before it, all that this Court would accomplish in granting the petition for certiorari would be to review the specific facts in

the *American College of Physicians* case. Such a review would do nothing to guide courts in making future decisions as to whether different facts in different cases met the "substantially related" test of Section 513(c).

Thus, contrary to what the government's petition would have this Court believe, the court of appeals decided no new question of law; it merely made a factual determination, which there is no good reason for this Court to disturb. We do not address the statutory construction by the appellate court, since the court considered this to be a factual case of "substantially related" activity.

III. THE COURT SHOULD NOT GRANT REVIEW ON THE BASIS OF "ADMINISTRATIVE CONVENIENCE"

The government asserts that certiorari should be granted because the question sought to be presented is of "administrative importance" and because the Federal Circuit's decision will "impose formidable burdens on IRS audit resources." (Petition at 22 and 24). In other words, the government claims that it will be administratively inconvenient for the Internal Revenue Service to comply with the Federal Circuit's interpretation and application of the statute and the regulations.

The government claims that the "revenue impact of the decision below would likewise be substantial," (Petition at 23), but the statistics which are used to support this claim are incomplete and misleading. The government relies on 1981 figures to establish the total number of trade journals in existence and their total advertising revenues but utilizes 1969 figures to establish the number of trade journals published by tax-exempt organizations. Of course, none of these figures assist this Court in estimating the revenue impact of the decision below. Published statements from the Department of Treasury do, however, provide some insight into the magnitude of the revenue impact.

According to a recent study by the Small Business Administration, the total revenues collected under the unrelated business income provisions in FY 1982 were $24,600,000. Of that amount, only a portion is attributable to taxes levied on the advertising

income of journals published by nonprofit organizations. Even if the government's concern, that the taxes collected on such advertising income will diminish, is correct, the loss of some portion of $24,600,000 in taxes hardly can be deemed as a "substantial" impact on revenue when the Internal Revenue Service collected more than $680,000,000,000 in 1984.

The government also contends that the IRS will suffer "formidable burdens" on its audit resources because the taxability of the advertising income of exempt organizations will now have to be addressed on a case-by-case basis. As the Court is aware, however, there are numerous provisions in the Internal Revenue Code which require analysis on a case-by-case basis.

According to the government, in the past the IRS has utilized a "presumption" that advertising income of tax-exempt organizations was taxable, despite the fact that the statute neither states that nor implies it; indeed, the regulations drafted by the IRS make it clear that not all such advertising revenue is taxable. While it may be "administratively convenient" for the IRS to utilize such a presumption, administrative convenience does not justify the improper application and enforcement of the revenue laws. "The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience." *Brown* v. *Harris*, 491 F. Supp. 845, 849 (N.D. Cal. 1980), citing *Manhattan General Equipment Co.* v. *C.I.R.*, 297 U.S. 129, 134 (1936).

If the government truly believes that the revenue impact of the Federal Circuit's decision is substantial or that the burden on the audit resources of the IRS is significant, then the appropriate forum for voicing those concerns is in the United States Congress, not this Court.

CONCLUSION

For all of the foregoing reasons, your amicus respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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